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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.*, CITY OF HIGHLAND PARK, a municipal corporation of Illinois,

Petitioner,

vs.

GEORGE B. McKIBBIN, Director of Finance of the State of Illinois, Successor to A. M. Carter,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

BENJAMIN F. J. ODELL,
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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The City of Highland Park, a municipal corporation of the State of Illinois, presents this petition in the name of the People of the State of Illinois to review a decision of the Illinois Supreme Court denying a tax refund to the petitioner.

The Public Utility Tax Act, under which compulsory payments had been collected by duress, contained a refund provision for "errors of law". The Court held the Act unconstitutional and also held that the refund section fell therewith. This repudiation of the refund section of an invalid tax act deprived petitioner of property without due process of law.

SUMMARY STATEMENT OF MATTER INVOLVED

On June 27, 1935, there became effective in the State of Illinois a Public Utility Tax Act, imposing a three per cent tax upon the gross receipts from sales of water, gas and electricity. (Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 120, Pars 440-453, Secs. 1-14). Petitioner, City of Highland Park, a municipal corporation of Illinois, was operating a municipal water plant, furnishing and selling water to its citizens. The City was ordered to pay the tax or be subject to prosecution under the misdemeanor section, and to the penalties provided (Rec. 4). Threats of prosecution were made against this City (Rec. 37).

Petitioner paid the tax under protest although the State Supreme Court decision indicates that plaintiff merely argued it paid its tax under protest. The complaint in Paragraph 7 (Rec. 4) alleged that installments of taxes were paid under protest. The motion to dismiss, as sustained, so admitted. This allegation was ignored by the State Court despite petitioner strenuously pointing this out in its briefs and petition for rehearing (Rec. 30).

These duress payments made monthly from July 1935 to January 1937 under protest aggregated $4,796.97 (Rec. 3).

On February 12, 1937, the Supreme Court of Illinois held this Public Utility Tax Act unconstitutional (*City of Chicago* v. *Ames*, 365 Ill. 529) on the ground that the Act made an unreasonable discrimination between taxpayers.

The City of Highland Park, thereafter, filed its claim for refund of taxes under said refund provision of the Act, as follows:

> "445. Erroneous payments—Credit.] § 6. If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department."
>
> Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 120.

Upon denial of its claim, the City of Highland Park instituted a mandamus proceeding in the Circuit Court of Cook County, Illinois. The Circuit Court judge denied relief because he thought the refund section itself was unconstitutional. The lower court's decision on this point, however, was nullified by a later Illinois Supreme Court decision holding that a similar refund section in a similar Act was constitutional (*Swartchild* v. *Carter*, 376 Ill. 590).

On appeal the Supreme Court denied petitioner its refund on the ground that the refund section fell because the tax was unconstitutional. This decision of the Supreme Court permitted the State of Illinois to keep the taxes which had been illegally exacted from the City of Highland Park. Petitioner's taxes had been paid because of compulsion, under protest and in reliance on the refund provision. The wording of the refund section, covering

"errors of law", was broad enough to take care of the contingency which occurred—unconstitutionality.

In the light of the inducement made for payment, by the refund section, the decision of the Illinois Court makes the legislative act an entrapment.

BASIS OF JURISDICTION

The Supreme Court of Illinois on September 14, 1942, denied petitioner, the City of Highland Park, refund of its $4,796.97 of taxes erroneously collected under an unconstitutional Tax Act (Rec. 14-19). Petition for rehearing was denied November 10, 1942 (Rec. 40). This petition was presented for filing within the three months period prescribed by Section 8 of the Act of February 13, 1925, calculating the time from denial date of the rehearing petition. This is within statutory time under several rulings of this Court.

The invalid Tax Act, under which petitioner was compelled to pay its taxes, carried a special refund provision providing for the return of taxes erroneously collected through mistake of fact or error of law (Rec. 3). Unconstitutionality is the result of an error of law. This Court has held the mere failure to return taxes illegally collected under compulsion violates the due process clause of the constitution. In case at bar there was a refund provision and the taxes were collected under duress (Rec. 4, 37) and paid under protest (Rec. 4).

The federal constitutional question was raised for the first time in the petition for rehearing (Rec. 29) with explanation, however, that it had not been raised before because of the taxpayer's sincere belief in the refund

section. Federal Supreme Court decisions were also cited (Rec. 29).

This Court has held that where the occasion for raising the federal question arose unexpectedly from the ground of the State Court's decision it is not too late when first raised upon petition for rehearing.

> *Great Northern Railway Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 367.

Or where the federal question arose from an unanticipated construction of a state statute.

> *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 665-6.

The Supreme Court of Illinois had allowed refunds to some taxpayer plaintiffs in the same suit that held the Tax Act unconstitutional, yet denied relief to this petitioner (365 Ill. 529). In not treating all taxpayers alike there is a further violation of the 14th Amendment in such discrimination as petitioner is denied equal protection of the laws under the refund section.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344 (b)), also under Rule 38 of this Court.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the fourteenth amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Legislature of Illinois enacted a Public Utility Tax Act in violation of one of the restrictions imposed upon the Legislature by the Constitution of Illinois. In the same Act was a refund section providing for a refund if taxes were paid under mistake of fact or error of law. Petitioner, City of Highland Park, alleged (Rec. 4) it was ordered to pay the monthly tax or be liable to onerous penalties and prosecution for a misdemeanor for violation of the Act (Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 120, Par. 444, Sec. 5). Petitioner was threatened by letter with prosecution (Rec. 37). Petitioner accordingly paid the tax, under protest, until the Act was held unconstitutional by the Supreme Court of Illinois.

Thereupon a request was made upon the State for a credit or refund of its taxes in accordance with the refund section, and after refusal this Mandamus action was instituted. The Supreme Court of Illinois held, in this action, that the refund section providing for the contingency of unconstitutionality "fell with the rest of the Act when the taxing section was declared unconstitutional" (380 Ill. 447, 451). This decison was rendered despite the fact, as admitted by motion to strike, that the payments were made under protest by virtue of duress, and notwithstanding that the refund section provided for the contingency of unconstitutionality and provided for the reimbursement to the taxpayer. In a prior decision (*City of Chicago, et al.*

v. *Ames*, 365 Ill. 529, 537), holding the Public Utility Tax Act unconstitutional, the Illinois Supreme Court provided for the return of taxes paid by the plaintiff municipalities in that case.

On these facts the questions presented are:

1. Has the City of Highland Park been deprived of property without due process of law under the 14th Amendment of the Constitution of the United States?
2. Has the City of Highland Park been deprived of equal protection of the law by reason of similar tax refunds given other municipalities but denied the City of Highland Park?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of the United States has held that where a State collects an illegal tax under compulsion and duress, and refuses to return the tax, it is a violation of the 14th Amendment of the Constitution of the United States, because it deprives the citizen of property without due process of law. The Supreme Court has pointed this out in:

Ward v. *Board of County Commissioners of Love County* (Oklahoma, 1920), 253 U. S. 17, 23-24.

Carpenter v. *Shaw* (Oklahoma, 1930), 280 U. S. 363.

Montana National Bank v. *Yellowstone County* (Montana, 1928), 276 U. S. 499, 504.

The United States Supreme Court has held that it is a violation of the 14th Amendment of the Constitution of the United States for a State to deny to any person within its jurisdiction the equal protection of the laws.

The City of Chicago and certain other municipalities recovered the taxes they paid under protest (365 Ill. 529, 537). Petitioner in case at bar, in an equal protection of the law, is likewise entitled to recover.

To permit this decision to stand will create a new vehicle of fraud upon taxpayers. A state can deliberately pass an unconstitutional tax act and in the same act provide for refunds if the tax is unconstitutional. The taxpayer is snared by the promise in the refund section. The refund is later denied not because the refund section is invalid but because the tax was unconstitutional. The state by this device can accomplish what is denied by the Constitution and thereby deprive the taxpayer of property without due process of law.

A tax was collected under an act that was a nullity and which was "* * * as inoperative as though it had never been passed" (*Norton* v. *Shelby County,* 118 U. S. 425, 442). The state without authority and by force and compulsion exacted this money from plaintiff. To not return this money or its equivalent at this time, deprives petitioner of property without due process of law.

The decision sought to be reviewed here is a final judgment of the court of last resort of the State of Illinois. There had been drawn in question in said court the validity of part of a State Statute. The decision holding the refund provision of the statute invalid on the facts is repugnant to the 14th Amendment of the Constitution of the United States. Petitioner has a title, right and privilege under the Constitution of the United States which it has a right to assert. The decision of the federal question was necessary to the judgment rendered by the Illinois Supreme Court. It is important to all Illinois

taxpayers to know whether they can rely on a tax refund section when a tax is illegal.

WHEREFORE, your petitioner respectfully requests that this Court issue a Writ of Certiorari to the Supreme Court of the State of Illinois to certify and send to this Court a complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court as provided by law and that the judgment below may be reversed, and for such other and further relief as may be appropriate and granted in the premises.

CITY OF HIGHLAND PARK,
Petitioner.

By BENJAMIN F. J. ODELL,
ROBERT THORSEN,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of the State of Illinois is reported in 380 Ill. 447.

The decree rendered (Rec. 9) on the hearing in the Circuit Court of Cook County which sustained the defendant's motion to dismiss complaint for Writ of Mandamus was entered January 9, 1941.

Jurisdiction

The decision of the Supreme Court of Illinois, sought to be reviewed, was entered September 21, 1942 (Rec. 14-19). Petition for rehearing was denied in the Supreme Court of Illinois November 10, 1942 (Rec. 40).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344 (b)), also under Rule 38 of this Court.

STATEMENT OF THE CASE

The material facts and the questions involved are set forth in the foregoing petition.

SPECIFICATIONS OF ERRORS

The Illinois Supreme Court erred:

1. In failing to hold that denial to the City of Highland Park of a credit refund for taxes illegally exacted of it under duress, constituted a violation of the 14th Amendment of the Constitution of the United States.

2. In failing to hold that under the 14th Amendment of the Constitution of the United States all of its citizens are entitled to equal protection of the laws of the State.

3. In holding the City of Highland Park was not entitled constitutionally to a refund of taxes illegally exacted of it by duress when paid under protest.

4. In holding that the City of Highland Park was not entitled constitutionally to a refund of illegal taxes paid under an unconstitutional act which provided for refund in the event of payment by mistake of fact or an error of law.

5. In failing to hold that the City of Highland Park was entitled to a Writ of Mandamus for a credit of taxes wrongfully exacted of it under an unconstitutional act.

SUMMARY OF ARGUMENT.

I.

The refusal of a State to return a tax collected by duress under an unconstitutional taxing act violates the 14th Amendment of the Constitution of the United States.

II.

Denial of the credit under the refund section of an unconstitutional tax act (when taxes are paid under duress) deprives petitioner of property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

III.

A municipality is denied equal protection of the law in violation of the 14th Amendment of the Constitution of the United States when it is denied a tax refund for taxes collected by duress under an unconstitutional tax act, where the decision holding the act unconstitutional awarded refunds to similar taxpayers in such action.

ARGUMENT.

I.

The refusal of a State to return a tax collected by duress under an unconstitutional taxing act violates the 14th Amendment of the Constitution of the United States.

This Court has held that where a State collects an illegal tax under compulsion and duress and refuses to return the tax, it deprives a citizen of property without due process of law in violation of the 14th Amendment of the Constitution of the United States. In *Ward* v. *Board of County Commissioners of Love County*, 253 U. S. 17, 23-24, it was said:

> "* * * the county demanded that the taxes be paid, and by threatening to sell the lands of these claimants and actually selling other lands similarly situated made it appear to the claimants that they must choose between paying the taxes and losing their lands. To prevent a sale and to avoid the imposition of a penalty of eighteen per cent they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal. The monies thus collected were obtained by coercive means—by compulsion. * * *
>
> As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well settled rule that 'money got through imposition' may be recovered back; and, as this Court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' *Marsh*

> v. *Fulton County*, 10 Wall. 676, 684; *City of Louisiana* v. *Wood*, 102 U. S. 294, 298-299; *Chapman* v. *County of Douglas*, 107 U. S. 348, 355. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State."

To the same effect is *Carpenter* v. *Shaw, State Auditor of Oklahoma*, 280 U. S. 363.

In *Montana National Bank* v. *Yellowstone County, et al.* (Montana, 1928), 276 U. S. 499, 504, this Court said:

> "* * * The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration (263 U. S. 418, 422—259 U. S. 503, 510). Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the money thus exacted in the public treasury."

In *Chicago B. & V. R. R.* v. *Chicago*, 166 U. S. 226, 234-5, where a judgment was rendered for $1.00 in a condemnation proceeding, and the condemnation judgment was affirmed in the Illinois Supreme Court, the United States Supreme Court in affirming the decision stated:

> "* * * But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amend-

> ment. In determining what is due proces of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' * * *"

This Court held in *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478, 484, that a wrongful decision by a State Court can deprive a person of property without due process of law.

In *J. & A. Freiberg Co.* v. *Dawson,* 274 Fed. 420, 431, affirmed in *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, the Court stated:

> *"Is there lack of due process of law?* This is only another form of stating the ultimate question. If the law is invalid for any of the reasons alleged, it is obvious that to enforce collection of the tax is to take the plaintiff's property without due process; hence we proceed to the reasons alleged."

Petitioner's complaint alleged that the installments of taxes were paid under protest; and through a mistake of fact or error of law; plaintiff was ordered and directed to pay the tax or be subject to onerous and confiscatory fines and penalties for which it was in no way responsible (Rec. 37).

The Department of Finance, which was vested under the Act with authority to enforce it, wrote petitioner threatening prosecution for a misdemeanor as follows:

> "We advise that the determination of whether or not a credit is due to any public utility rests with this Department and not with the public utility. We, therefore, advise you that you must not make this deduc-

tion and that any deduction arbitrarily so made is a violation of Article 9 of the Rules and Regulations relating to the Retailers' Occupation Tax Act. Any wilful violation of Article 9, or any other article of the Rules and Regulations relating to the Retailers' Occupation Tax Act, is covered by Section 13 of the Public Utility Tax Act itself, which Section reads as follows:

> 'Any public utility referred to in section 1, in this State, which fails to make a return, or which wilfully violates any rule or regulation of the department for the administration and enforcement of the provisions of this Act, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000.00).''

In view of this warning, if such deduction is made, a hearing will be at once scheduled whereat a record will be made under the above noted section of the Public Utility Tax Act'' (Rec. 37).

In addition, the Public Utility Tax Act in Section 5 (Illinois 1935 Revised Statutes, Chap. 120, Par. 444) provided for a penalty of twenty-five per cent (25%) for failure to pay the tax and an accumulating interest of one per cent (1%) per month. It can not be doubted that payment of the tax was made as a result of the duress and compulsion. This fact is admitted by the motion to dismiss. The payments as protested put the State on notice that plaintiff was not submitting to the duress and compulsion.

Where the State promises to return the money and then fails the taxpayer is doubly injured. First, the taxpayer is lulled into a feeling of security—deprived of his vigilance. Then refused relief because the tax which he paid by compulsion and under protest is void and another

remedy from which he is now barred might have given him relief.

A person acting under duress and compulsion does not have to choose his remedy at his peril. In *Union Pacific R. R. Co.* v. *Public Service Commission of Missouri*, 248 U. S. 67, 69-70, this Court held:

> "* * * It always is for the interest of a party under duress to choose a lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called. *The Eliza Lines*, 199 U. S. 119, 130, 131. If, as may be, the supreme court of the State regards or will regard this statute as inapplicable, *Public Service Commission* v. *Union Pacific Railroad Co.*, 271 Missouri, 258, probably the State would not wish to retain the charge but we repeat, the Railroad Company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils, that made it practically impossible not to comply with the terms of the law, *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor*, 223 U. S. 280, 286."

The Illinois Supreme Court intimates petitioner could have paid under protest while the fact that it did is fully admitted by defendant's motion to strike the complaint. This motion to strike was granted.

The Illinois Supreme Court has said in next to final paragraph of its opinion:

> "* * * appellant has not pursued the remedy set out in the statute to recover for invalid taxes paid under protest. * * *" (Rec. 19.)

From this it might seem the provision referred to by the Court was in the tax act or refund section in question. Not so, however, as the Court is referring to an optional choice given a taxpayer. The two remedies are entirely independent. The 14th Amendment does not require that

a citizen must choose at his peril the remedy which the court will approve when both remedies are valid. A citizen has a right to rely upon a valid remedy and this remedy can not be taken away by a rule of construction. To do so deprives the citizen of property without due process of law. He is not prejudiced or deprived of any rights if he fails to select the Court's choice of remedies. The 1935 independent statutory provision to which the Court refers speaks for itself as follows:

> "35. Custody and deposit of moneys paid under protest.] § 2a. It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this Act by section 1 hereof to [notify the State Treasurer as to money paid to such officer, board, commission, commissioner, department, institute, arm or agency, under protest and the Treasurer shall place such money in a special fund to be known as the protest fund. At the expiration of thirty days from the date of payment the money shall be transferred from the protest fund to the appropriate fund in which it would have been placed had there been payment without protest] unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such [transfer], in which case such payment shall be held [in the protest fund] until the final order or decree of the court."
>
> Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 127b, Par. 35, Sec. 2a.

There is nothing inoperative about the so-called protest statute that overrides the refund section the legislature put in the Public Utility Tax Act. There is no connection between the two acts nor any concern of dependency of either on the other. The refund section in the tax act did not require every taxpayer to file an injunction with each payment or lose his right to the refund. Federal

rights here are neither increased nor diminished by an optional privilege for injunction. The injunction right existed at the court's discretion independently of the statutory act on the custody of protest money.

II.

Denial of the credit under the refund section of an unconstitutional tax act (when taxes are paid under duress) deprives petitioner of property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

In the State of Illinois because of constitutional restrictions (Illinois Constitution, Article IV, Section 17) illegal taxes can not be refunded from the State Treasury without a specific appropriation, even where a refund section is provided. (*Adams* v. *Nudelman*, 375 Ill. 217.) This applies equally to payments made under duress.

In the complaint in this cause, it was alleged:

> "That plaintiff cannot sue or bring any action against the State of Illinois for the recovery of taxes illegally and erroneously exacted and collected from it, or for any part thereof; that it has no adequate remedy other than a Writ of Mandamus to compel the Director of Finance of the Department of Finance of the State of Illinois to issue a credit or to grant the credit by reason of Section 6 of the Act; that it is the duty of the Director of Finance in accordance with Section 6 to grant and permit a credit to the extent of the taxes erroneously collected." (Rec. 5-6.)

This allegation also is admitted by the motion to dismiss, which motion the Court granted.

The Illinois Supreme Court denied petitioner's request, that it be allowed to ask for a money judgment (Rec. 28-29), by denying the petition for rehearing.

Therefore, the only recourse open to petitioner is a credit provided for in the Refund Section 6 of the Act which is as follows:

> "445. Erroneous payments—Credit.] § 6. If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department."
>
> Illinois Revised Statutes (1935 State Bar Assn. Edition), Chap. 120.

To deny plaintiff credit in the amount of its $4,796.97 for taxes paid, because of an erroneous application of a rule of construction, deprives plaintiff of its only recourse and of property without due process of law. To hold, as the Illinois Court has, that this refund section which provided for this error of law (unconstitutionality) fell because the error of law occurred, deprives plaintiff of property without due process of law. In other words, when the contingency provided for in the refund section occurred, the Court should not have held because the contingency occurred the refund section fell and was ineffective. Certainly the unconstitutionality of this Act was the kind of "legal error" provided for in the refund section.

Upon the Act being held unconstitutional on February 12, 1937, the Legislature of Illinois immediately passed a new Public Utility Tax Act, and which was approved by the Governor of Illinois March 11, 1937, even before the Petition for Rehearing in that case was denied on April 7, 1937. This new Public Utility Tax Act was the same as the previous Act except for the elimination of the unconstitutional feature. Under the new Act the City of Highland

Park was relieved of the tax on the sales of water by its municipal plant.

This second Act in its Section 16 revealed that because of the unconstitutionality of the previous Act an emergency existed and that the new Act was intended to replace the first Act immediately. The new Act bore the same title, contained the same sections and was a duplicate Act except that the unconstitutional objections and water were eliminated. For the convenience of the Court we set out this Section:

> "WHEREAS, the Public Utility Tax Act, approved June 27, 1935, has been declared unconstitutional and substantial source of revenue for the relief of persons in destitute and necessitous circumstances has been eliminated by said holding, and whereas it is vitally necessary to the health, safety and well-being of such persons and to prevent untold hardship and suffering among such persons that moneys for their relief be available immediately prior to the 1st day of July: THEREFORE, an emergency exists and this Act shall take effect upon its passage."
>
> Illinois Session Laws 1937, Sec. 16, Page 1057.

By reason of Section 2 of the Illinois Chapter on Statutes the valid portions of the first Act were continued in the second Act. Said Section 2 of the Chapter on Statutes provides as follows:

> "2. Construction of revised acts.] § 2. The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions, and not as a new enactment."
>
> Illinois Revised Statutes (State Bar Assn. Edition), Chap. 131.

This section of the statute has been liberally construed by the Courts of Illinois. The Illinois courts have even

held that the theory of the continuation of a statute prevents the legal re-enactment of an Act held to be unconstitutional and that an attempt to re-enact an unconstitutional act is void by virtue of such coninuation. (*Salzman* v. *Boeing*, 304 Ill. App. 405.)

"In ascertaining the intention of the legislature in amending an act the state of the law prior to the amendments must be considered, and the provisions of the statute as amended, so far as they are the same as those of the prior statute, shall be construed as a continuation of such prior provisions. Section 2, ch. 131, Ill. Rev. Stat. 1939 [Jones Ill. Stats. Ann. 27.14.] *Spiehs* v. *Insull*, 278 Ill. 184; *Landry* v. *E. G. Shinner & Co., Inc.*, 344 Ill. 579."

Taman v. *Marcus*, 310 Ill. App. 512, 514, transferred 375 Ill. 210.

"* * * Where the legislature enacts an amendatory statute, providing that a certain act or section of an act shall be amended so as to read as the same is repeated in the amendatory act, such portions of the old law as are retained, either literally or substantially, are regarded as a continuation of the old law and not as a new enactment. * * *"

City of Chicago v. *Foley*, 335 Ill. 584, 589.

"* * * Moreover, when the General Assembly amends a statute and no change is made in parts of it, the repeated portions, either literally or substantially, are regarded as a continuation of the existing law and not as the enactment of a new law upon the subject. (*People* v. *Lloyd*, 304 Ill. 23; *Svenson* v. *Hanson*, 289 id. 242.) * * *"

People ex rel. Adams v. *N. Y., C. & St. L. R. R. Co.*, 316 Ill. 452, 457.

"* * * Where the law on a particular subject is revised and re-written, only the provisions of the old law which are omitted from the revised act are repealed

and all provisions of the old law retained in the new act are regarded as having been continuously in force. (*Mette* v. *Feltgen*, 148 Ill. 357.) * * *"

Merlo v. *Coal and Mining Co.*, 258 Ill. 328, 333-334.

The refund section in the 1937 Public Utility Tax Act was a continuation of the valid existing refund section in the 1935 Act. The fact that the 1935 refund section continues determines that the 1935 refund section still exists in the 1937 Act.

It has been held in Illinois that the credit granted under a refund section is transferable (*People ex rel. Ben Stone* v. *Nudelman*, 376 Ill. 535). Such a refund section has been held to be constitutional (*People ex rel. Swartchild* v. *Carter*, 376 Ill. 590). Therefore, credit issued in accordance with provisions of the refund section of the Act would permit petitioner to obtain money illegally exacted of it under duress. To not grant this credit in accordance with the refund section deprived petitioner of its property, illegally appropriated by the State, without due process of law in violation of the 14th Amendment.

If this State court decision stands, a new instrument of extortion has been created.

Under the decision of the State court, a State can pass with impunity an unconstitutional tax act, and by the inducement of a valid refund section confiscate the citizen's property. When called upon to comply with the valid refund section, the State, under this decision, can refuse to return the property, despite the valid refund section, on the ground that the tax act was unconstitutional. Thus this decision legalizes a possible fraud upon citizens. Its result is abhorrent to sound government.

III.

A municipality is denied equal protection of the law in violation of the 14th Amendment of the Constitution of the United States when it is denied a tax refund for taxes collected by duress under an unconstitutional tax act, where the decision holding the act unconstitutional awarded refunds to similar taxpayers in such action.

Under the refund section providing for the return of taxes illegally collected in the event of mistake of fact or error of law, there was no requirement of any special method to be pursued to recover such taxes, and there was no requirement for protest or duress, nor was there a requirement that an injunction be obtained.

In the Supreme Court case holding the tax act unconstitutional (*City of Chicago* v. *Ames*, 365 Ill. 529), certain municipalities were allowed to recover the tax money which they had paid under the act and under protest. Under this refund section, in the absence of any special requirement, every municipality would and should be entitled to the monies exacted of them under the illegal act with its compulsory provisions for enforcement. There was no contention by defendant in this case that the tax act was not unconstitutional and, therefore, the provisions of the refund section became operative alike for all taxpayers. To deny relief to this municipality despite the relief granted to the other municipalities, results in a discrimination against this petitioner, violating the equal protection clause of the 14th Amendment of the Constitution of the United States.

It is true, as heretofore shown, that in Illinois there is a statutory provision that if a tax is paid under protest the taxpayer may apply for an injunction within thirty

days after payment, and that the Court may grant a temporary injunction, as was done in *City of Chicago* v. *Ames*. This statute is not mandatory upon the Court; an injunction may or may not be issued, as the Court sees fit. The right to the injunction in all instances rests within the discretion of the Court. In fact the remedy of a temporary injunction has been denied in many tax cases by the Courts of Illinois, as for instance in *Vause & Striegel, Inc.* v. *McKibbin*, 379 Ill. 169. At the time that the 1935 Public Utility Tax Act was enacted, and for six months thereafter, this statutory provision for a temporary injunction required the obtaining of an injunction within thirty days after each payment of any protested tax. The tax in this case was required to be paid monthly. Many of the payments in this case, as will appear from the Record (Page 3) involved some payments of a few dollars or less; one of the payments being as small as ten cents. In view of the monthly payments and the small amount of the tax, this requirement of filing a bill in chancery and obtaining a temporary injunction for each payment was prohibitive from the standpoint of cost and was an effective bar to the use of the injunction. Within six months after the Illinois Supreme Court had held this Public Utility Tax Act unconstitutional, whereby petitioner's payments of the tax were terminated, the legislature of Illinois, recognizing the injustice and the defect in the Act providing for the injunction, amended the injunction act so as to permit one temporary injunction to cover all succeeding payments of a contested tax. (Illinois Revised Statutes (1937 State Bar Assn. Edition), Chap. 127, Par. 172, Sec. 2a.) Thus petitioner could not protect itself by one temporary injunction at the time it was required to pay the tax. It is to be conceded that a large city such as Chicago,—plaintiff in *City of Chicago* v. *Ames* (365 Ill. 529) would have such substan-

tial monthly payments that the injunction statute afforded it adequate relief even under the previous provisions, and even without the refund section. This state of facts, however, were not existent with the petitioner, City of Highland Park, whose payments for many months were of nominal amounts. This petitioner did not have such an adequate remedy for protection against the taxes exacted of it by duress because, unfortunately, it was a small city.

There is no requirement under the 14th Amendment of the Constitution of the United States that a citizen deprived of property without due process of law must first seek an injunction or any other special relief, nor is there any in Illinois, although a taxpayer may apply for an injunction if he wishes. Especially is there no such requirement where a refund section is provided, as in the case at bar. An unqualified refund section in any tax act dispenses with the need for an injunction.

The effect of the decision in this case is to judicially validate or ratify an unconstitutional tax. It gives rebirth to a tax act which was void, by the simple expedient of allowing the State to keep the money. The Court has in effect nullified the act in so far as the State is concerned but enforced it against this taxpayer. If the act had sufficient validity for the State to keep the money, the act should have sufficient validity in the refund section for the State to return the money.

The legislaure can not ratify a void act. A defect can be cured but validity can not be given *ex post facto.*

In the case of *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, the Board of Commissioners without authority and by duress collected tolls from the plaintiff for passage through a canal. Plaintiff sued to recover for tolls collected for two years. After the case had been sub-

mitted to the Supreme Court of Florida, the legislature of Florida passed an act authorizing the collection of the tolls and ratifying past collections.

Justice Holmes in upholding the plaintiff's right stated (page 339):

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act [ratifying collection of toll] is passed. * * *"

In denying the State the right Justice Holmes held at page 340:

> "* * * Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation. * * *"

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, at page 431, the Court stated:

> "* * * If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 679, 680."

The grounds of the decision in the State Court was that petitioner had another remedy if it had pursued it, but the Court in its decision admits that remedy is gone. Petitioner had two remedies, injunction or the refund section. Because the injunction remedy did not adequately serve

the purposes of this petitioner, it chose the refund section which was a valid constitutional enactment. To now hold that petitioner is denied relief because it did not choose the other remedy when petitioner had a right to rely upon the refund section is an effective way of denying petitioner all relief. The Illinois Supreme Court did not hold that the refund section was invalid or defective but held because the taxing clause fell the whole act fell. This holding was made despite the refund section's provision for this contingency of unconstitutionality.

The only distinction the Supreme Court of Illinois makes between *City of Chicago* v. *Ames* and the case at bar is that an injunction was procured in the former and not in the latter. Both plaintiffs conducted themselves in an identical manner including protesting.

The refund section did not require an injunction or any other action than payment of a tax that was not due. A citizen does not have to gamble on which of two valid remedies the court will recognize. The remedies are a matter of right. To grant relief to one group under one remedy and to deny it to another group under an equally valid remedy deprives the latter of equal protection of the law. A remedy does not exist at the caprice of the court.

CONCLUSION

The State of Illinois passed an unconstitutional Public Utility Tax Act. That Act protected a taxpayer against all mistakes of fact and errors of law. The legislature had made an "error of law" which caused the unconstitutionality. The tax act also carried drastic provisions to compel payment of the tax. The State threatened to enforce these rigid, penal provisions and ordered petitioner to pay this tax.

Petitioner cautiously paid its tax under protest to avoid result of the duress thus exercised against it. When the Supreme Court of Illinois ruled the tax was unconstitutional, petitioner, after demand, brought action to recover the taxes wrongfully exacted of it. The Supreme Court of Illinois then held petitioner was not entitled to have its taxes returned because the refund section fell with the unconstitutional act and refused to consider petitioner's request for a cash refund.

Petitioner now asks protection against the deprivation of its property to which it believes it has been subjected without due process of law. Petitioner asserts the 14th Amendment of the Constitution of the United States affords it relief from this legal ensnarement.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718

PEOPLE OF THE STATE OF ILLINOIS, EX REL. CITY OF HIGHLAND PARK, A MUNICIPAL CORPORATION OF ILLINOIS,

Petitioner,

vs.

GEORGE B. McKIBBIN, AS DIRECTOR OF FINANCE OF THE DEPARTMENT OF FINANCE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Supreme Court of the State of Illinois is reported in 380 Ill. 447.

The decree rendered (Rec. 9) on the hearing in the Circuit Court of Cook County which sustained the defendant's motion to dismiss complaint for Writ of Mandamus was entered January 9, 1941.

Jurisdiction.

Respondent submits that this court should not take jurisdiction because no federal question is involved.

RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE.

Petitioner's statement of the facts and of the nature of the proceeding is so very inaccurate as to be entirely misleading. In the first paragraph of the petition, petitioner's counsel says:

> "The City of Highland Park * * * presents this petition * * * to review a decision of the Illinois Supreme Court **denying a tax refund** to the petitioner."

This statement is not true. Petitioner at no time sought, asked, or requested any tax refund whatsoever. (Prayer of petitioner's complaint, Rec. 6.)

What the petitioner **did** seek was a right to have the amount of taxes paid under a statute enacted in 1935 and later held unconstitutional (*City of Chicago* v. *Ames*, 365 Ill. 529) applied **not** as against taxes due under that act, but against taxes to become due in the future **under an act not passed until 1937.**

In other words, all that petitioner actually sought was to have taxes paid under one act, which act was held unconstitutional, credited against taxes to become due under a taxing act passed two years after the enactment of the first act. That petitioner never sought a cash refund is instantly apparent from the following considerations:

The only party respondent to petitioner's petition for writ of *mandamus* was the Director of Finance of the State of Illinois (Rec. 1). In Illinois it is well settled that the court has no jurisdiction to compel disbursements of state funds, the disbursement to be made in actual cash, unless the State Treasurer and State Auditor be made parties to the *mandamus* proceeding. This rule is not questioned. Two late recognitions occur in *People ex rel.*

Markee v. *Barrett* (decided January, 1943), No. 26940, and *People ex rel. Davidson, et al.* v. *Bradley, et al.* (decided January, 1943), No. 26990.

It was not alleged in the complaint, nor is it pretended in this court, that the respondent had any state fund within his possession from which to make disbursement.

Therefore, while several issues were involved, the **only** ultimate question presented to any court of the State of Illinois was whether payment under a *former* statute, which statute was held unconstitutional, entitled the taxpayer to a credit of the amount of such payments against taxes due under a *new and different* taxing act.

SUMMARY OF ARGUMENT.

I.

PETITIONER WAS NOT ENTITLED UNDER THE CONSTITUTION OR OTHERWISE TO CREDIT TAXES PAID UNDER ONE ACT AGAINST TAXES TO BECOME DUE UNDER A LATER ACT.

a. Even if the first Public Utility Tax act were still in force, it would not authorize the crediting of payments made under such first act as against taxes accruing under the subsequent act of 1937, nor does the second act authorize the crediting as against taxes due under that act amounts paid on account of the first act.

b. Even were that section still in existence, it would only permit the recovery of taxes which the legislature did not intend to impose under that act, not taxes which the legislature did intend to impose but failed to impose effectively because the act proved to be unconstitutional.

c. Even assuming that the provisions of Section 6 of the 1935 act were sufficient in scope to justify relief in this type of a case, those provisions were completely obliterated by the Illinois Supreme Court's holding that the act of which they formed a part was unconstitutional and void.

d. Even had Section 6 of the 1935 act survived as an independent enactment, it would have been automatically repealed by the legislature's enactment of a complete new act in 1937.

II.

THE ONLY QUESTIONS DECIDED BY THE SUPREME COURT OF ILLINOIS WERE QUESTIONS OF ILLINOIS STATUTORY LAW. NO QUESTION OF FEDERAL CONSTITUTIONAL LAW WAS PRESENTED TO THE COURTS BELOW, NOR IS ANY SUCH QUESTION PRESENTED HERE.

ARGUMENT.

I.

PETITIONER WAS NOT ENTITLED UNDER THE CONSTITUTION OR OTHERWISE TO CREDIT TAXES PAID UNDER ONE ACT AGAINST TAXES TO BECOME DUE UNDER A LATER ACT.

(a) Even If the First Public Utility Tax Act Were Still in Force, It Would Not Authorize the Crediting of Payments Made Under Such First Act as Against Taxes Accruing Under the Subsequent Act of 1937, Nor Does the Second Act Authorize the Crediting as Against Taxes Due Under That Act Amounts Paid on Account of the First Act.

The "original" or *first* Public Utility Tax act, passed in 1935 (Laws of Illinois, 59th General Assembly), imposed a tax measured by the gross receipts from the sale of gas, water, or electricity and from the transmitting of telegraph and telephone messages "for domestic or commercial consumption and not for resale". (Act cited, Sec. 1.)

Section 6 of the *first* act was as follows:

> "If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited *against any tax due, or to become due, under this Act* from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department." Approved June 27, 1935; in force July 1, 1935. (Italics ours.)

It will be immediately observed that the only credit authorized by the section in question is the credit allowed

> "against any tax due or to become due *under this Act.*"

Of course, petitioner does not and cannot contend that there are any taxes due

> "under *this Act,*"

that is, under the *first* act, since the taxing provisions of that act have been held unconstitutional by the Supreme Court of Illinois.

Therefore Section 6, as it was originally enacted as a part of the *first* act, cannot possibly purport to authorize the credit of taxes erroneously paid under that act as against taxes to become due under an act which was not passed until approximately two years later. Certainly at the time the legislature enacted the original act in 1935 it could not reasonably have anticipated that that act would be declared unconstitutional, since if it had anticipated such a result the act in question would never have been enacted at all.

By the same line of reasoning, it will be seen that the legislature could not possibly have intended, when it passed the 1935 act, that payments to be made under the provisions of *that* act should form the basis for credits against taxes to accrue in the future under the provisions of taxing acts which had as yet neither been enacted or even contemplated.

In view of this background we submit that the conclusion is inescapable that when the 1935 legislature expressly provided that credits on account of taxes paid under *that* (original) act should be permitted as against taxes due or to become due

"under *this* Act,"

it meant just what it said and no more, that this terminology is binding upon the courts, and that therefore, even if we assume that Section 6 of the original act of 1935 is still in full force and effect, (which is *not* true) even under the wording of that original provision the plaintiff is *not* entitled to credit taxes paid under the original invalid taxing act of 1935 as against taxes accruing under the subsequent taxing act of 1937, as plaintiff here attempts to do.

(b) Even Were That Section Still in Existence, It Would Only Permit the Recovery of Taxes Which the Legislature Did Not Intend to Impose Under That Act, Not Taxes Which the Legislature Did Intend to Impose But Failed to Impose Effectively Because the Act Proved to Be Unconstitutional.

Respondent contends under this subdivision that Section 6 of the *first* Public Utility Tax Act intended to authorize refunds only of taxes paid erroneously according to the *intent and meaning* of that act; that Section 6 of that act is utterly meaningless unless it is read in the contemplation of the provisions imposing the tax with respect to which the legislature intended to provide refunds; and that when the act as a whole (including the unconstitutional taxing provisions) is thus read in order to impart meaning to the refund provision as the Supreme Court of Illinois in *People, ex rel. Swartchild* v. *Carter,* 376 Ill. 590, held must be done, it is clear beyond all reasonable dispute that the legislature intended to authorize only refunds of taxes the payment of which was erroneous *according to the standards expressed in the act.*

In other words, it is the respondent's contention that it is only amounts which, *according to the provisions of the act,* the legislature did *not intend* to authorize the Department of Finance to collect, that it meant to refund by crediting such payments against future taxes to become due under the same act. If any substantial question exists as to whether the legislature intended to refund *all* taxes collected under the present act (by crediting them against future taxes to become due under the same act, when, if the act as a whole was unconstitutional, no such taxes could possibly become due) the following reflections should conclusively resolve such questions:

The first Public Utility Tax Act is, in its general conception and structure, modeled upon the Illinois Retailers' Occupation Tax Act. It was clearly intended to supple-

ment the Retailers' Tax Act after the Supreme Court of Illinois had held that gross receipts from the sale of electricity were not taxable under the Retailers' Tax Act (*Peoples Gas Light Co.* v. *Ames*, 359 Ill. 152). The refund provisions of the first and second Public Utility Tax Acts are drawn in language almost identical with that of the corresponding provisions of the Retailers' Occupation Tax Act. (See *Retailers' Occupation Tax Act*, section 6.)

Section 1 of the first Public Utility Tax Act (Laws of Illinois, 59th G. A., 1935, p. 1194, 1935 Revised Statutes, chap. 120, sec. 454) contained statutory definitions of such terms as "gross receipts", "public utility", "transmitting telegraph or telephone messages", and the like. The second section imposed a tax upon "each public utility," the tax being measured by gross receipts derived from

> "the conduct of the business of transmitting telegraph and telephone messages and of distributing, supplying, furnishing or selling water, gas or electricity to persons for domestic or commercial consumption and not for resale."

That section contained an express exemption

> "with respect to any transaction in interstate commerce or otherwise which transaction may not under the constitution and statutes of the United States be made the subject of taxation by this state."

Experience with revenue measures in general and with acts imposing taxes upon "gross receipts" derived from "engaging in business" in particular had demonstrated that it is quite impossible to draft such an act in terms at once sufficiently generic to comprehend within the scope of such terms the subject matter of the tax, and sufficiently particular and detailed to avoid difficult questions of law with respect to the persons, transactions, and receipts intended to be subjected to the act.

Had the act stood the test of constitutionality, questions must inevitably have arisen, for example, as to what con-

stituted a "public utility", what transactions amounted to a "sale of gas, water or current" for "domestic or commercial consumption", when such consumption was "not for resale", and when gas, electrical energy, or water transmitted into the state in interstate commerce ceased to flow in such commerce and became subject to the revenue powers of the State of Illinois. The Supreme Court of Illinois has been confronted with a great press of similar questions under the Retailers' Occupation Tax Act. Had the first Public Utility Tax Act been enforced according to the legislative intent, many utilities would necessarily have paid taxes under an erroneous interpretation of its provisions.

Moreover, mistakes of pure fact would have been certain to occur. Errors in metering, bookkeeping, and ascertaining the intended purpose of gas, electricity, and water would have resulted in the overpayment of taxes to the state.

The legislature obviously enacted the first act in the belief that it would be sustained as constitutional. The legislature no doubt contemplated errors of law and fact in its administration and enforcement, but it cannot reasonably be supposed to have anticipated that the entire act would be declared invalid. It is very clearly the sort of mistake of law or fact indicated above—that is, a mistake in the ascertainment of facts and the application of the meaning of the act to those facts—that the legislature had in mind when it provided for the correction of such mistakes by refunds or credits under Section 6 of that act.

As absolutely conclusive that the legislature intended to refund only taxes paid erroneously according to the intent and meaning of the taxing provisions of the first act, even though those provisions were later determined to be unconstitutional, we cannot emphasize too strongly the following observation:

Since the legislature has not appropriated funds for

rebates in cash of taxes paid under the first act, the only refunds possible would be those authorized to be made effective by credits against taxes to become due under the taxing provisions in question. But if those taxing provisions were unconstitutional, **no taxes would ever become due under them.** Therefore, to hold that the legislature intended to refund *all* taxes paid under the first act by applying them against future taxes to become due under that act would be to impute to the legislature the completely absurd intent to refund taxes which were not due by crediting them against taxes which never would become due.

Our interpretation of the provision in question is clearly in accord with the express language employed by the legislature in section 6 of the *first* act (Laws of Illinois, 59th G. A., 1935, p. 1179; 1935 Revised Statutes, Chap. 120, Sec. 455), which provided as follows:

> "If it shall appear that any amount of tax, penalty or interest has been paid *which was not due under the provisions of this Act,* whether as a mistake of fact or an error of law, *then* such amount shall be credited against any tax due, or to become due under this Act from the public utility which made such erroneous payment, or such amount shall be refunded to such public utility by the Department." (Italics ours.)

It will immediately be appreciated that this section purports to permit credits *only where the amounts which were collected were not due under the provisions of this Act.* No remedy was granted permitting credits as to sums *which were due under the provisions of this (the first) Act* but which provisions were subsequently held invalid.

Our view of this statutory provision is substantially the view recently (December 29, 1941) taken by the Supreme Court of Utah in the case of *Shea* v. *State Tax Commission,* 120 Pac. (2d) 274. There the statutory remedy provided

(Laws of Utah, 1935, Chap. 46, Sec. 149, p. 108) was as follows:

> "Whenever the department through error collects any fee *not required to be paid hereunder* the same shall be refunded to the person paying the same upon written application therefor made within six months after date of such payment." (Italics ours.)

A certain portion of the taxing act, assessing a mileage tax against diesel powered trucks, was held invalid and unconstitutional on the ground that it was beyond the scope of the title of the act which said nothing about revenue, and the plaintiff sought a refund of such taxes under the section above quoted on the theory that a collection under the terms of a void provision is a collection "through error" and one "not required to be paid hereunder" in the words of the refund provision.

In refusing relief, the Supreme Court of Utah, at pages 275 and 276, said:

> "We cannot suppose that in enacting the law the legislature that in contemplation of its enactments were unconstitutional. * * * Words 'erroneously paid,' relating to refunding of taxes paid cannot be applied to payment of any tax which for 'any' reason is invalid, but must be taken in ordinary sense of mistakenly paid, and were clearly intended to cover cases where payment was made under misapprehension as to what was being paid. *Security National Bank* v. *Twindle, et al.*, 52 S. D. 352, 217 N. W. 542. The section as to refunds there considered was held to apply only to collections which the officials themselves have determined at the time of collection that they should not collect, such determination to be made as a matter of fact and not of law."

In view of the foregoing considerations, it is respectfully submitted that even if Section 6 of the original act of 1935 were still in full force and effect, and even if it could be construed so as to authorize the crediting of payments under the 1935 act as against taxes accruing under the 1937

act (*neither* of which assumptions is true), it would only authorize the recovery of taxes which the legislature *did not intend to impose* under the taxing provisions of the 1935 act, and *not taxes which it did intend to impose* under the provisions of that act but failed effectively to impose because the act proved to be unconstitutional.

Applying this test to the facts in the case at bar, it is clear that the legislature *did intend to impose the very tax which the petitioner here seeks to recover*, and that therefore no relief may be predicated upon the provisions of Section 6 of the Act of 1935.

(c) Even Assuming That the Provisions of Section 6 of the 1935 Act Were Sufficient in Scope to Justify Relief in This Type of a Case, Those Provisions Were Completely Obliterated by the Illinois Supreme Court's Holding That the Act of Which They Formed a Part Was Unconstitutional and Void.

The *first* Public Utility Tax Act of 1935 was held unconstitutional and void in the case of *City of Chicago* v. *Ames*, 365 Ill. 529. It should be noted, at the very inception of this portion of the argument, that the Court did not there hold merely that, as applied to the plaintiffs in that case, the act in question was unconstitutional and void. On the contrary, the Court, at pages 536 and 537, seems to take the position that the act is void as an integrated entirety and that therefore the plaintiffs could challenge its validity, even though the particular provision there specifically attacked might not directly affect them.

The general rule with respect to the effect of a decision holding a particular statute to be unconstitutional and void is well stated in 12 Corpus Juris at page 801, where it is stated that:

> "No rights may be based on, nor may duties be imposed by, an unconstitutional statute. This rule applies to any part of an act which is found to be unconstitutional."

The only exception to this general rule is where some particular section is not actually integrated into the act in question but is of such an independent and severable character that the Courts will presume that the legislature, even had it known that the balance of the act was unconstitutional and void, would, nevertheless, have passed the specific section in question as an independent enactment.

This principle is well stated in the case of *Springfield Gas Co.* v. *Springfield,* 292 Ill. 236, in which the Supreme Court of Illinois, at pages 243 and 244, took occasion to say:

> "While it is well settled by adjudications of this and other courts that if different sections of a statute are independent of each other, that which is constitutional may be disregarded and valid sections be permitted to stand and be in force, yet it is also the inflexible rule that where a portion of an act is valid and a portion invalid, *and the court cannot say that the Legislature would have passed the act with the invalid portion eliminated, then the entire act must be held invalid. People* v. *McBride,* 234 Ill. 146; *Cornell* v. *People,* 107 id. 372; *Hinze* v. *People,* 92 id. 406; *People* v. *Cooper,* 83 id. 585; *Matthews* v. *People,* 402 id. 389; *Kellyville Coal Co.* v. *Harrier,* 207 id. 624." (Italics ours.)

Another excellent statement of this rule is to be found in the case of *People ex rel. Hoyne* v. *Olsen,* 204 Ill. 494, where the court, at page 497, said:

> "The rule is: 'If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other; but if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion, and if they are so mutually connected with and dependent on each other, as conditions, consideration, or compensation for each other, as to warrant the belief that the legislature intended them as a whole, and that *if all*

> *could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.'* (Cooley's Const. Lim., pp. 178, 179.)'' (Italics supplied.)

The principle enunciated in the foregoing language is of course familiar learning. We perceive no useful purpose to be served by multiplying citations to the same effect. Similar expressions will be found in *People* v. *Union Bank and Trust Company,* 362 Ill. 164, where the court quotes language to the same effect from *Cooley's Constitutional Limitations* as well as from other authorities.

The cases cited by petitioner do not challenge but on the contrary support the rule as above stated. Let us therefore examine the provisions of the 1935 act to ascertain whether or not it is reasonable to presume that had the legislature realized at the time it passed the act in question, that the tax thereby imposed would fail as unconstitutional, it would, nevertheless, have enacted Section 6 of that act as an independent enactment.

It is too plain to admit of argument that the legislature would *not* pass an act authorizing the refund of taxes if it has passed no act imposing such taxes. Section 6, if enacted apart from the taxing provisions of that same act, would be pure nonsense. An act purporting to refund taxes which had not been levied would never pass both houses of the legislature and receive the governor's approval. It is therefore clear that the refund provisions were inseparable from the taxing provisions.

We respectfully but earnestly insist that the question of whether petitioner and all other public utilities in the State of Illinois are entitled to a refund of all of the taxes paid during a period of eighteen months depends wholly upon the creation of such a right to a refund by the legislature and not by the Department of Finance or by this court.

Under an unquestioned rule, so fundamental as to be a primary axiom of American jurisprudence, one provision of a statute will *not* be sustained as constitutional when the other provisions are unconstitutional unless the court can fairly say that the legislature would have passed it as a separate and independent act, had it known that such other provisions would be declared invalid. It is too obvious to admit of the slightest doubt that the legislature would not have passed an act contemplating the refund of taxes unless it had thought that it had the power to pass the taxing act in the first place. A departure from this rule by the courts would constitute a usurpation of the function of the legislative branch of government. Appellee therefore maintains that Section 6 of the first act cannot be upheld as an independent enactment.

Even if it be assumed (*contrary* to the facts), that the legislature would have passed Section 6 of the original act of 1935 as an independent enactment, there would be considerable doubt as to its constitutionality.

The petitioner takes the position that the Supreme Court of Illinois has held, in the fairly recent case of *People ex rel. Swartchild* v. *Carter*, 376 Ill. 590 (1941), that an identical refund section of the Retailers' Occupation Tax act was valid and constitutional. This is not at all accurate.

In the *Swartchild* case, the Supreme Court of Illinois did *not* hold that the refund section of the Retailers' act, standing alone, would be valid and constitutional, but *on the contrary,* strongly implied that such a section, standing alone without the other provisions of that act, would probably be *invalid.* All that the court there held, as respects that particular section, was that *as supplemented by the other provisions of that admittedly valid act,* the section in question was valid and constitutional, saying, at page 592, as follows:

> "It is claimed that section 6 is unconstitutional because it delegates judicial power to an administrative

board, and because there are no procedural requirements set up in section 6 requiring a hearing. *If section 6 were a separate and independent act of legislation, this argument might be persuasive. However,* this section is but a part of a general statute consisting of fifteen or more sections. It is comprehensive in its scope. * * *

"*The entire act, including all the sections,* must be construed together to ascertain the intent of the legislature. The act, as a whole, has been held constitutional." (Italics ours.)

It thus strongly appears that in so far as the Illinois cases are concerned, Section 6 of the 1935 Act would not stand alone for at least *two* reasons, *first*, the legislature would never have passed it as an independent piece of legislation, and, *second*, even if it had, it would probably have been invalid because it would not be supplemented by the balance of the act of which it was a part.

(d) Even Had Section 6 of the 1935 Act Survived as an Independent Enactment, It Would Have Been Automatically Repealed by the Legislature's Enactment of a Complete New Act in 1937.

After the 1935 Public Utility Act had been held unconstitutional in the case of *City of Chicago* v. *Ames*, 365 Ill. 529 (decided Feb. 12, 1937) the legislature, by an act approved March 11, 1937 (Laws of Illinois, 1937, pp. 1052-57), promptly took notice of that holding and replaced the Act of 1935 with a complete, new act which expressly recognized, in Section 16, that "the Public Utility Tax Act, approved June 27, 1935, has been declared unconstitutional" and that the new act was intended to take its place as a principal source of revenue to be used for relief purposes.

This new Act of 1937 was, in its scope and provisions, as complete and comprehensive as the earlier act had been and was definitely intended as a complete new piece of legislation, designed to take the place of and supersede the earlier invalid act, and not merely to amend or sup-

plement the earlier act. It did, however, omit certain provisions of the earlier act relating to sales of *water*, and the new act, therefore, purported to levy a tax measured only by such receipts as were derived in connection with telegraphs, telephones, gas and electricity.

It is a well established rule of law that where the legislature enacts a comprehensive revision of the prior law respecting a certain subject matter such an act automatically repeals all prior enactments respecting that same subject matter, without the use of any express words for that purpose, *except* in so far as the subsequent act substantially re-enacts the earlier law, in which case the earlier remedy is considered as having been continuously in force, but only as respects such persons as qualify *under both the old and the new version of such a remedy.*

This principle is well stated in the case of *Merlo* v. *Coal and Mining Co.*, 258 Ill. 328. In that case the plaintiff was the widow of an employee who had lost his life in the service of an employer and after a judgment in her favor in the trial court had been rendered the statute was revised.

There the Court took the view that she was entitled to a recovery *both under the provisions of the earlier and later statutory provisions*, saying at page 345:

> "In the case at bar the deceased left only a widow, who would be entitled, *under either statute*, to the entire amount of the recovery. (*Beard* v. *Skeldon*, 113 Ill. 584; *Willis Coal and Mining Co.* v. *Grissell*, 198 id. 313.)" (Italics ours.)

Obviously, then, as to her, the latter amendment was not a repeal but a mere continuation of the earlier remedy.

In discussing the legal principles governing such cases, the Court, at pages 333 and 334, said:

> "Statutes may be repealed in whole or in part by amendment. If the legislature enacts an amendatory statute providing that a certain act or a certain section of an act shall be amended so as to read as the same is

> repeated in the amendatory act, *all such portions of the old act or section as are not repeated in the new act are repealed without any express words for that purpose* (*Moore* v. *Mausert,* 49 N. Y. 332; *Breitung* v. *Lindauer,* 37 Mich. 217); but such portions of the old law as are retained, either literally, or substantially, are regarded as a continuation of the old law and not as a new enactment. (Hurd's Stat. 1911, Chap. 131, sec. 2; *Cushman* v. *Bonfield,* 139 Ill. 219, Lewis' Sutherland on Stat. Const., sec. 237, and cases there cited.) Statutes may also be repealed by a general revision. Where the law on a particular subject is revised and rewritten, only *the provisions of the old law which are omitted from the revised act are repealed* and all provisions of the old law retained in the new act are regarded as having been continuously in force. (*Mette* v. *Feltgen,* 148 Ill. 357.) The rule in respect to repeals by revision is the same as repeals by amendment. There is no hiatus between the death of the old and the coming of the new law." (Italics ours.)

Another case illustrating this long established principle is *People* v. *Lindheimer,* 371 Ill. 367. There the statute was revised and the plaintiffs contended that the new act merely continued and did not repeal the earlier statutory remedy. The Court, however, took a different view and denied relief, saying, at page 375:

> "Section 1 of the Act of 1935 provides for a refund or credit where judgment is entered affecting twenty-five per cent or more in number of the properties, *but it is not shown or claimed that appellees come within that provision, and so far as they are concerned the repeal is absolute.* * * * There are different methods by which a prior statute may be repealed, *i. e.,* by express declaration, or by implication *or through amendment* or revision." (Italics ours.)

This is also the rule in other States. In the case of *Moore* v. *Mausert,* 49 N. Y. 332, the Court of Appeals of New York took the position that even where a statute is "amended so as to read as follows" etc., a failure to sub-

stantially re-enact an earlier provision of the statute so amended, repeals those portions so omitted without expressly so stating, saying, at page 335:

> "In *Ely* v. *Holton* (15 N. Y. 595), it was decided by this court that the effect of an amendment of a statute made by a subsequent statute declaring that such statute shall be amended so as to read as follows, retaining a part of the statute amended and incorporating therein new provisions, was not to repeal the part retained and re-enact the same, but that such part of the statute continued in force from the first enactment, and that the new provisions incorporated became operative from the time the amendatory statute took effect. *It would follow that, where certain provisions of the original statute were omitted from the amendatory statute, such provisions were abrogated and ceased to form any part of the statute after such time.* Applying these principles to the present case, it follows that * * * the provision for filing notice in the office of the town clerk of the town, in the fourth section, being left out of the section as amended, was abrogated at the same time."

In the case of *Breitung* v. *Lindauer,* 37 Mich, 217, the Supreme Court of that State, in speaking of the effect of a subsequent amendatory act upon an earlier statute, at page 233, said:

> "The rule is that the latter act operates *to the extent of the repugnancy,* as a repeal of the first, or, if the two acts are not in express terms repugnant, yet if the latter *covers the whole subject of the first,* and contains new provisions showing that it was intended as a substitute, it will operate as a repeal. *U. S.* v. *Tyneu,* 11 Wall. 92." (Italics court's.)

In view of the general principles above stated, we submit that since, *after* the 1935 act had been held unconstitutional by the Supreme Court of Illinois, the legislature enacted a new piece of legislation, not only comprehensive in its scope and complete in its provisions but expressly disclosing on its face that it was intended to take the place

of and supersede the earlier act, the provisions of Section 6 of the 1935 Act were repealed by necessary implication, unless the plaintiff can establish that it is entitled to relief under the refund provisions of the subsequent act of 1937.

II.

THE ONLY QUESTIONS DECIDED BY THE SUPREME COURT OF ILLINOIS WERE QUESTIONS OF ILLINOIS STATUTORY LAW. NO QUESTION OF FEDERAL CONSTITUTIONAL LAW WAS PRESENTED TO THE COURTS BELOW, NOR IS ANY SUCH QUESTION PRESENTED HERE.

Under the preceding Point, the respondent has argued the questions of the construction and proper intendment of the Illinois acts of 1935 and 1937, respectively, very much as though the question of such construction was properly before this court as a question of first impression. However, the question is really *not* a question of federal law, but is purely a question of the construction of statutes of the State of Illinois. The Supreme Court of Illinois has definitely and conclusively held that the acts in question did not support a construction entitling the petitioner to a credit as against taxes under an act passed in 1937, of amounts paid under an act passed in 1935.

It certainly cannot be seriously contended that this construction of Illinois statute does violence to any canon of due process of equal protection of the law.

If this court were to reverse the decision of the Supreme Court of Illinois (and of course, if the Statute of Limitations had not now intervened) the consequence would be that as to almost every utility in the State of Illinois, no taxes could be collected under the 1937 act until taxes assessed under that act had exceeded amounts paid under the 1935 act. Such construction would (if its practical operation were not now barred by the Statute of Limitations) have completely frustrated the revenue policy of

the *second* act. The legislature was not bound by any constitutional mandate to provide, as to a tax to be levied in the future, that payment might be made in any medium other than money. Certainly it was not bound to provide that moneys unconstitutionally collected in the past should be credited against any specific tax in the future.

Moreover, petitioner did not rest its claim upon any federal constitutional ground until its petition for rehearing. It is not deemed necessary to cite authority for the proposition that a court of review is not bound to take cognizance of contentions made for the first time upon petition for rehearing.

Still another consideration, which, respondent submits, is decisive of the question whether a federal constitutional point is involved here, is the following:

Petitioner has rested its case on Section 1 of the 14th Amendment, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

But this court has repeatedly held that a municipality cannot claim the protection of the 14th Amendment against the act or failure to act of its author, the state.

In the case of *Trenton* v. *New Jersey,* 262 U. S. 182, the City of Trenton asserted that the State, by enacting a statute charging the city fees for water which it diverted from streams for the municipal water supply, took "property owned by the City in its private or proprietary capacity for public use without just compensation and without

due process of law in violation of the Fourteenth Amendment."

This court, in deciding the controversy adversely to the city, said at page 187:

> "A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. * * *
>
> "In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514 * * * it is said (pp. 524-5):
>
> "'Institutions of the kind, whether called cities, towns or counties, are the auxiliaries of the State in the important business of municipal rule: * * *.'
>
> "The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned."

In the same case, this court discussed the distinction sometimes made between acts of a municipality in its governmental capacity, and its acts in a proprietary capacity. The court then continued on page 192:

> "But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. *They do not apply as against the State in favor of its own municipalities.* * * * In view of former opinions of this court, no substantial federal question is presented."

The *Trenton case* was followed in another case decided on the same day, and reported in the same volume, *Newark* v. *New Jersey*, 262 U. S. 192. In that case this court, citing its previous decision, said at page 196:

> "The city cannot invoke the protection of the Fourteenth Amendment against the State."

Another case, cited in the Trenton opinion, is *Hunter* v. *Pittsburgh*, 207 U. S. 161. The grievance of the peti-

tioners in that case was a statute of Pennsylvania which consolidated two cities. The petitioners alleged at page 169:

> "The Act of Assembly under which this petition is filed is in conflict with Article XIV of the amendments to the Constitution of the United States, because the said annexation of the City of Allegheny to the City of Pittsburgh deprives your respondents of their property without due process of law."

This court, however, denied that a municipality could claim the protection of the 14th Amendment as against the state whose creature it was, since

> "there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

The principle that a municipality cannot invoke the Fourteenth Amendment to forestall an act of the state which created it has been followed not only by this court, but by state tribunals as well. A leading case is *Shelby* v. *City of Pensacola*, 151 So. 53 (Fla., 1933).

In that case, the Florida legislature having changed the status of municipal civil service employees, and one of them having sued the City of Pensacola under that statute, the City defended by asserting that the statute violated the Fourteenth Amendment.

The Supreme Court of Florida said at page 55:

> "It is an established principle of constitutional law that those constitutional restraints imposed by the federal constitution against state action do not apply against the state in favor of its own municipality in so far as equal protection of the laws and due process of law under the Fourteenth Amendment are concerned. *Trenton* v. *New Jersey*, 262 U. S. 182.
>
> "As a protection of the liberty and property rights of persons against adverse legislative action on the

part of the *state*, the clauses of the 14th Amendment to the Constitution of the United States which declares that no *state* shall deprive any *person* of life, liberty or property without due process of law, nor deny any *person* within its jurisdiction the equal protection of the laws, have never been held applicable to municipal corporations, on the theory that such public corporations are '*persons*' within the purview of the language of the 14th Amendment.

"Indeed, in only two cases has the contention ever been put forward in the United States Supreme Court that the equal protection clause of the 14th Amendment to the United States Constitution was so applicable; *Williams* v. *Eggleston*, 170 U. S. 304; *Mason* v. *Missouri*, 179 U. S. 328; and in each of these cases the contention was, as might have been expected, summarily denied, because had the court ruled otherwise, the whole complex subject of the reasonableness of classifications for the purpose of creating municipal governments under charters granted by state legislatures would have become thereby a federal question."

Other state cases holding that the state legislature is not restrained in its dealings with its own municipalities are: *Riley* v. *Stack*, 1933, 18 P. 2d 110, 72 Cal. App. Dec. 116; *St. Louis* v. *Shields*, 52 Mo. 351, 354; *Police Jury of Bossier* v. *Corporation of Shreveport*, 5 La. Ann. 661, 665; *Trustees of Schools* v. *Tatman*, 13 Ill. 27; *Board of Education* v. *Aberdeen*, 56 Miss. 518; *Darlington* v. *City of New York*, 31 N. Y. 164, 193.

Respondent submits, therefore, that no federal question is before this court, since petitioner did not introduce any such question at a stage of the proceedings where the Supreme Court of Illinois was bound to consider it, and even if petitioner had properly suggested such a question, there nevertheless can be no invocation of the 14th Amendment by a municipality against the state which created it.

Conclusion.

In view of the foregoing considerations, we respectfully submit that petitioner is not entitled, under the constitution or otherwise, to credit taxes paid under one act against taxes to become due under a later act, since neither act authorized any such credit; since even if the first act had given such authority it was completely obliterated when the Supreme Court of Illinois held it unconstitutional; and since, even if the first act giving such authority had not as to that particular provision, been held invalid, even so it would have automatically been repealed by the enactment of the new and complete second statute. We further submit that, aside from the above, no federal question is raised upon this record since a municipality cannot claim the protection of the 14th Amendment against the state which created it.

We therefore respectfully pray that this Court dismiss the petition for writ of *certiorari*.

Respectfully submitted,

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(30)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.*, CITY OF HIGHLAND PARK, a municipal corporation of Illinois,

Petitioner,

vs.

GEORGE B. McKIBBIN, Director of Finance of the State of Illinois, Successor to A. M. Carter,

Respondent.

PETITIONER'S REPLY to RESPONDENT'S BRIEF

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Respondent's serious, but unwarranted charge that we have misled this Court, is refuted by the Record which shows the following facts:

1. Demand for cash or credit. (Rec. 4)
2. Denial of both cash and credit. (Rec. 5)

3. Complaint for mandamus to compel issuance of a credit. (Rec. 1-6)
4. Denial of mandamus writ. (Rec. 9, 21)
5. Petition for Certiorari filed in this Court. (February 10, 1943)

Petitioner was, and is, seeking a refund of taxes in the form of a credit pursuant to the tax refund provision of the Act under which the tax was paid. (Rec. 3) A tax refund in the form of a credit is a tax refund as much as cash would be a tax refund.

I.

Petitioner has contended that the refusal of the State officials to return taxes collected by duress under a void tax act deprived petitioner of property without due process of law.

Respondent's contentions made under this point are not responsive, because they are arguments as to statutory construction and do not question the fact that petitioner was deprived of property without due process of law. Respondent's points were all raised in the State Courts and are State questions.

II.

As pointed out on page five of our Petition for Certiorari, the Federal question was timely raised in the lower court.

Respondent cites the case of *Trenton* v. *New Jersey* (262 U. S. 182), to support his contention that a municipality is not within the protection of the XIV Amendment to the Constitution of the United States in the pursuit of its private functions.

The Trenton case involved a purely governmental function of the municipality, and is not authority in support of the proposition that a City's private property is subject to unrestricted seizure by a State legislature. Further, the case at bar does not question the power of the legislature but seeks the enforcement of a legislative act—the refund section.

In the Trenton case a license fee or State tax was imposed upon the municipality for the diversion of water from a State waterway. Petitioner does not question the right of the State to impose a lawful tax. Nor does Petitioner question the right of a State to control the public function of a municipality. That the decision in the Trenton case was confined to a governmental function, is supported by the portion of its opinion cited by respondent as follows:

> "The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned. * * *"
>
> *Trenton* v. *New Jersey,* 262 U. S. 182, 188.

That only a governmental function was there involved is supported also by the statement of the Court as follows:

> "The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources. * * *"
>
> *Trenton* v. *New Jersey,* 262 U. S. 182, 185.

In the case at bar, no legislative control over the municipality in any of its functions is involved. Petitioner does not attack the power of the legislature in this case. To the contrary, petitioner here is predicating its suit solely on the basis of an act of the legislature—the refund section.

By definite contrast to the Trenton case, Petitioner here has had its property illegally appropriated by an official of the executive branch of the State under a void act, (in legal effect no act at all). No question of interference with the legislative power of the State is presented. Petitioner is seeking the enforcement of a legislative act providing for a tax refund.

Petitioner in this cause seeks the recovery of its property in accordance with the legislative mandate contained in the refund section. The failure to so return its property illegally obtained by duress, deprives petitioner of property in violation of the legislative intent and in violation of the due process clause of the XIV Amendment.

While in the Trenton case a purely governmental function was involved, the case at bar involves a private function of a municipality, *i. e.*, the ownership and operation of a public utility. The Trenton case involved the using of water from a State waterway. In case at bar the water plant is owned and operated exclusively by the City for and on behalf of its citizens. It is the collective property of the citizens of the municipality.

It is firmly established that a municipality functions in two capacities: (1) It functions in its governmental capacity in which case it is considered a mere instrumentality of the State, and (2) It functions in a private or proprietary capacity, in which case it is entitled to all rights and privileges and is held to all responsibilities of a private corporation.

The Supreme Court of Illinois has held:

> "'A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. * * * It stands upon the same footing as would any individual or body of persons, upon whom the like special franchises had been

conferred.' Appeal of Brumm, 12 Atlantic Reporter, 855. To same effect see, *Western Savings Fund Society* v. *City of Philadelphia,* 31 Pa. St. 175; *Bailey* v. *Mayor, etc., of New York,* 3 Hill 531."

Wagner v. *City of Rock Island,* 146 Ill. 139, 154-5.

"Municipalities are created primarily for the exercise of such powers of sovereignty as the General Assembly bestows upon them, and the production of water, gas or electricity for all municipal purposes is within the scope of governmental function, but when a municipality goes into the business of furnishing water for sale through contracts made between it and the consumer, which contract the consumer has an option to make or not, as he pleases, such municipality does so not in the capacity of sovereignty but in a private capacity. (*Sanitary District* v. *Carr,* 304 Ill. 120; *Springfield Gas and Electric Co.* v. *City of Springfield,* 292 *id.* 236; *Eastern Illinois State Normal School* v. *City of Charleston,* 271 *id.* 602; *People* v. *Schlitz Brewing Co.,* 261 *id.* 22; *Wagner* v. *City of Rock Island,* 146 *id.* 139.) 'Business' is a very comprehensive term. It has been defined as any particular occupation or employment habitually engaged in expressly for livelihood or gain. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 55 L. ed. 389."

City of Chicago v. *Ames,* 365 Ill. 529, 533.

The rule of law which accords unrestrained control to the legislature over cities, on governmental functions, is beyond dispute. To hold otherwise would dissipate the sovereignty of the State as to all powers granted to the municipality or other divisions of the State government. To bring such governmental functions within the XIV Amendment would destroy the self-government of the State. However, where the municipality holds property or is engaged in a purely private function, the reason for this rule fails, because in such instances there is no State sovereignty concerned. Neither the States nor the United

States have unfettered power to seize, destroy or injure the property of a citizen or corporation of the State. The wrongful seizure by the State of such property does not involve the question of sovereignty. It then becomes a question of abuse of State sovereignty as restricted by the constitution. The rights of the citizens in and to a municipally owned water plant are entitled to the same protection as the rights of other citizens.

As far back as 1815, this Court speaking through Justice Story, in *Pawlet* v. *Clark,* 13 U. S. 292, held that the private property of a municipal corporation could not be appropriated by the State. This principle was reaffirmed in the Dartmouth College case where Justice Story stated:

> "* * * It may also be admitted, that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendent, that it may at its will take away the private property of the corporation, or change the uses of its private funds, acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corporations are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it.

Terrett v. *Taylor*, 9 Cranch 43; *Town of Pawlet* v. *Clark*, *Ibid.* 292."

Dartmouth College v. *Woodward*, 17 U. S. 517, 694-5.

This principle was again restated in *Hunter* v. *Pittsburgh*, 207 U. S. 161, 179:

> "It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts. (1 Dillon, Municipal Corporations, 4th ed., sections 66 to 66a, inclusive, and, cases cited in note to 48 L. R. A. 465), and it has been held that as to the latter class of property the legislature is not omnipotent. * * *"

This Court has also held that a municipality with an independent financial interest in a controversy is a citizen and can sue and be sued in a Federal Court, although the State has also an interest. (*Port of Seattle* v. *Oregon & W. R. R.* (1920), 255 U. S. 56, 71.)

Again we find in McQuillin on Municipal Corporations, Second Edition, after reviewing this subject for over a hundred pages, the following summary:

> "§ 245 (226). General doctrine stated. It thus appears that, according to the weight of the later judicial decisions (and earlier ones also), municipal corporations may own, in a private or proprietary capacity, property which is viewed by the law as held for the benefit of the inhabitants of the locality free from legislative appropriation or control, and is held by the

local corporation under the security of private rights applicable to individuals.[84] It also appears from the above consideration that the property held by the municipal corporation for the public generally as distinguished from its own inhabitants is subject to control by the legislature.[85]"

McQuillin Municipal Corporations—Second Edition, Revised Vol. 1, Sec. 245 (226), p. 689.

The Illinois Constitution provides in Section 2 of Article 2 that:

"No person shall be deprived of life, liberty or property, without due process of law."

Illinois, by statute, has provided that:

"The word 'person' or 'persons' as well as all words referring to or importing persons, may extend and be applied to parties politic and corporate as well as individuals."

Illinois Revised Statutes (State Bar Edition), Chap. 131, Sec. 1, Fifth.

The Illinois Supreme Court has likewise construed and approved this section. (*The People* v. *Deep Rock Oil Corp.*, 343 Ill. 388, 401-2.)

The very act in the case at bar defines the word "person" to include a municipal corporation as follows:

"§ 440. Terms defined.] Section 1. For the purposes of this Act:—* * * 'Person' means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, or a receiver, trustee, conservator or other representative appointed by order of any court, or any city, town, county or other political subdivision of this State. * * *"

Illinois Revised Statutes 1935.

Illinois State Bar Edition, Chap. 120.

The Illinois Supreme Court in the case holding the Utility Act invalid said:

> "The use of the term 'person' in statutory enactments has been held to include municipalities. (*People* v. *Deep Rock Oil Corp.*, 343 Ill. 388; *Ohio* v. *Helvering*, 292 U. S. 360, 78 L. ed. 1307.) * * *"
>
> *City of Chicago* v. *Ames*, 365 Ill. 529, 532.

The City of Highland Park is entitled to the same protection and the same refund as any other private utility owner and should not be deprived of this right because the utility is owned by the citizens of Highland Park instead of being owned by private capital. This is especially true when no question of State sovereignty or powers of the legislature is in issue.

CONCLUSION.

Apparently the only contention of respondent in opposition to our Petition for Certiorari, is that a municipality cannot invoke the protection of the XIV Amendment to the Constitution of the United States. Defendant has cited the Trenton case which involved a governmental function by the municipality, and also State Court decisions which seem contrary to the decisions of the Illinois Supreme Court. Petitioner has cited authority showing that property of a municipality owned for private purpose is not subject to the omnipotent control of the legislature. The proprietary rights of the municipality are similar to those of an individual and are similarly protected. Thus a distinction exists between the facts in the Trenton case and case at bar. Under the novel facts in the present case, no attack is made on the power of the legislature. Petitioner is merely seeking its rights as exhibited in the legislative provision. The wrong complained of is the appropriation

of petitioner's property through the exercise of duress and compulsion by a public official acting under a void statute. No question of legislative power over the municipality is presented in this case. The real issue is whether a municipality is protected against the unlawful act of a public official, performed by him under the guise of a void statute.

It is the contention of petitioner, upon the facts presented, and for the reasons shown, that private property of a municipality is entitled to the protection afforded an individual under the XIV Amendment to the Constitution of the United States.

Respectfully submitted,

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